IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

W.G. NICHOLS, INC., RICHARD VAN DALEN, and CAROL THOMPSON, Plaintiffs,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 01-834
JOSEPH D. FERGUSON and MICHELE A. FERGUSON, Defendants.	:	

Memorandum and Order

YOHN, J. June ___, 2002

Presently before the court is a motion for summary judgment filed by defendants Joseph ("Ferguson") and Michele Ferguson (collectively "defendants") and a cross-motion for partial summary judgment filed by plaintiffs W.G. Nichols, Inc. ("Nichols"), Richard Van Dalen and Carol Thompson (collectively "plaintiffs"). For the reasons that follow, defendants' motion will be granted and plaintiffs' motion will be denied.

I Background[1] and Procedural History

In or around October, 1989, Ferguson retained Olsen and Associates ("Olsen"), an architectural firm, to design a commercial building to be located at 1020 Andrews Drive, West Chester, Pennsylvania ("the facility" or "the building"). Defendants' Motion for Summary

[1] Given that both parties have moved for at least partial summary judgment, I will state the facts in as wholly neutral a fashion as possible, and will denote issues as to which factual disputes exist.

Judgment ("Defs.' Motion") ¶ 8. Olsen also was to supervise the approval of the building's design and to oversee its construction. *Id.* On June 19, 1991, Ferguson received from West Goshen Township, the municipality in which the facility is located, a building permit for the outer shell of the facility. Defs.' Motion at Exhibit E; Plaintiffs' Motion for Partial Summary Judgment ("Pls.' Motion") at Exhibit 4. Ferguson subsequently had the inside of the building prepared for tenant use, and he received approval for these tenant "fit outs" from the Pennsylvania Department of Labor and Industry ("L & I") in November, 1992. *Id.* at Exhibit 6. Construction of the facility was completed in late 1993, and an occupancy permit was issued by L & I on December 27, 1993. Defs.' Motion ¶ 16; Plaintiffs' Memorandum of Law in Support of their Motion for Partial Summary Judgment ("Pls.' Memo. in Support") at 6.

Although the parties contest the date on which space within the building first became available, it is undisputed that by 1997 defendants were seeking tenants to occupy a large portion of the facility. Defs.' Motion ¶ 20; Plaintiffs' Answer to Defendants' Motion for Summary Judgment ("Pls.' Answer") ¶ 20. Around the same time, representatives of Nichols, a corporation engaged in the publishing business, desired a new space in which to base the company's operations. The 1020 Andrews Drive building came to their attention as a location that potentially suited the company's needs, and in mid-1997 Nichols management first saw the facility, as Dean Morgantini (the president of Nichols at the time), Glenn Potere (an owner of the company), and their realtor toured the building twice in one day.[2] Defs.' Motion ¶ 21. On July 16, 1997, Nichols entered into an agreement with defendants to lease a significant portion of the

[2] Although defendants allege that Cal Settle, a Nichols employee, also participated in these tours, plaintiffs deny this assertion. Pls.' Answer ¶ 21.

1020 Andrews Drive facility. The lease covered the entire second floor of the building, 1,400 square feet of a garage bay, and a triangular office located adjacent thereto. *See* Addendum to Office Lease Agreement ¶ 1. The agreement was to run until August 14, 2002, although it explicitly provided Nichols with the right to terminate the lease at the end of the third year, provided that defendants were afforded 12 months notice and that Nichols paid defendants a $65,000 buyout in addition to the rent due during the third year of the lease term. *See id.* ¶ 2.

Although the details of this interaction are reported differently by the parties, it is undisputed that Nichols informed Ferguson some time after Labor Day, 1999 of its intention to vacate the premises.[3] Under the terms of the lease, this gave rise to a choice on the part of Nichols. It could either pay the $65,000 buyout, or it could find a subleasee, provided that defendants were afforded notice of any prospective sub-tenants. *See* Lease ¶ 4(a). Nichols alleges that it considered the buyout but opted instead to sublet the premises. Pls.' Answer ¶ 35. It further is undisputed–although the reasons for this are the subject of one of the fundamental contests in this case–that Nichols never actually found a subleasee for its portion of the building.

On February 20, 2001, Nichols, Thompson and Van Dalen[4] filed the instant

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[3] Specifically, Nichols avers that it found unacceptable the building's lack of an elevator (though the facility was equipped with an elevator shaft). Pls.' Answer ¶ 34. Nichols further asserts that although it requested that Ferguson install an elevator in the empty shaft, Ferguson refused this request, and it was this response that prompted the company's decision to vacate the premises. *Id.* Defendants, by contrast, aver simply that Nichols stated that it would be vacating the building prior to the expiration of the five year lease term. They say nothing regarding the effect of any discussion regarding the elevator on Nichols's decision. Defs.' Motion ¶ 34.

[4] Van Dalen is the majority shareholder and Chief Executive Officer of Nichols, and he runs the company's day-to-day operations. *See* Affidavit of Richard Van Dalen ¶ 1; Deposition of Richard Van Dalen ("Van Dalen Dep.") at 56. Plaintiffs allege that Van Dalen made frequent use of the 1020 Andrews Drive facility. Thompson is an employee of Nichols

lawsuit. Count II of the original complaint filed by plaintiffs contained an erroneous caption, and on April 11, 2001 I granted defendants' motion to dismiss this claim pursuant to Fed. R. Civ. P. 12(b)(6) without prejudice to plaintiffs' right to amend their pleading to correct this error. Plaintiffs did so promptly, filing an amended complaint on April 13, 2001. This amended complaint contains five counts, and I will discuss each in turn.

In count I, plaintiffs allege that defendants have violated numerous statutory provisions by failing to make their building accessible to disabled individuals, including the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12182(b)(2)(A)(ii), 12182(b)(2)(A)(iv), 12182(b)(2)(A)(v) and 12183(a)(1) and (2), and Pennsylvania's Physically Handicapped Act ("PPHA"), 71 Pa. Cons. Stat. § 1455.1c(a).[5] As a consequence of these asserted violations, plaintiffs seek declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28

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who worked at the facility. Plaintiffs further assert that both of these individuals qualify under the Americans with Disabilities Act as "disabled." *See* Amended Complaint ¶ 3.

[5] Plaintiffs also argue that "[d]efendants were additionally and independently required under the ADA to install an elevator . . . because such installation is 'readily achievable' within the meaning of Section 301(9) of the ADA, 42 U.S.C. § 12181(9), and because the absence of an elevator constitutes an architectural barrier pursuant to 28 C.F.R. § 36.304." Amended Complaint ¶ 49. However, 28 C.F.R. § 36.304 is merely a regulation implemented in furtherance of the statutory requirement codified at 42 U.S.C. § 12182(b)(2)(A)(iv), and does not constitute an independent mandate that architectural barriers in existing public accommodations be removed. Similarly, 42 U.S.C. § 12181(9) is merely a definitional section that clarifies the meaning the terms used in the ADA's substantive provisions. It does not independently constitute a basis for relief. Indeed, the "readily achievable" language that is defined in that section also is derived from 42 U.S.C. § 12182(b)(2)(A)(iv), which plaintiffs separately allege defendants to have violated. Accordingly, I will construe plaintiffs' "readily achievable" and "architectural barrier" arguments as being raised in support of their claim under § 12182(b)(2)(A)(iv).

U.S.C. § 2201, and 42 U.S.C. § 12188(a)(1)[6] respectively. They also seek reasonable attorney's fees as provided for by 42 U.S.C. § 12205. As for the first two forms of relief, plaintiffs specifically desire (1) a declaration that defendants' failure to install an elevator–or some equivalent means of access to the upper portions of the building–during both construction and subsequent alterations to the facility violated Title III of the ADA and the PPHA; and (2) an injunction setting aside, as of June, 2000, the lease for the 1020 Andrews Drive building. *See* Amended Complaint ¶¶ 27-63.

In count II, Nichols alleges that in violating the ADA and PPHA, defendants also breached the lease agreement. Amended Complaint ¶ 70. Nichols asserts that as a result of this breach, it was forced to expend monies to move to a facility located at 1025 Andrews Drive that provided access to its upper floors to disabled people, and has been unable to sublease its portion of the 1020 Andrews Drive building, as prospective tenants have balked upon learning that the building is not ADA-compliant. *Id.* ¶¶ 71, 74. As a result of defendants' alleged breach of the lease agreement, Nichols seeks compensatory damages, attorney's fees, costs and interest. *Id.* at 15.

In count III, Nichols posits that defendants, as lessors, owed it a duty under Pennsylvania common law to lease a structure that complied with the statutory laws of the Commonwealth, specifically with 71 Pa. Cons. Stat. § 1455.1c(a). In violating the PPHA, Nichols's argument goes, defendants simultaneously breached this common law duty. Nichols asserts that defendants' violation of this statutory obligation renders them negligent per se.

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[6] § 12188, which sets forth the remedies available under Title III of the ADA, incorporates by reference the forms of relief that are available under 42 U.S.C. § 2000a-3(a).

Nichols further contends that as a result of this negligence it is unable to sublet the building, and that it has been forced to (1) pay two rents simultaneously (i.e. for the facilities located at both 1020 and 1025 Andrews Drive); (2) incur moving expenses; and (3) make additional expenditures on behalf of employees whose disabilities were worsened by defendants' negligence. Amended Complaint ¶¶ 76-81. Plaintiffs allege that as a consequence of this negligence they are entitled to compensatory damages, attorney's fees, costs and interest.

In count IV, Nichols asserts that defendants tortiously interfered with its prospective contractual relations. The crux of this claim is that because defendants failed to make the common areas of its building compliant with the ADA and PPHA, Nichols has lost "potential tenants, rental payments, reimbursement for improvements left with [its former] space, as well as other associated expenses and the continuing rental costs." Amended Complaint ¶ 86. Nichols argues that this interference was knowing and willful, and that it warrants compensatory and punitive damages, attorney's fees, costs and interest.

Finally, in count V, Van Dalen and Thompson aver that despite their repeated requests for elevator access to the upper portions of the building, defendants failed to provide the same, thereby resulting in the worsening of their respective physical impairments. These plaintiffs further assert that they have suffered psychological distress and have incurred various pecuniary expenses as a result of the exacerbation of their disabilities. They seek compensatory and punitive damages, attorney's fees, costs and interest. Amended Complaint ¶¶ 89-94.

On September 17, 2001, defendants moved for summary judgment dismissing each count of the amended complaint. Their arguments, like plaintiffs' responses to them, are fairly straightforward. Both are summarized below.

As for plaintiffs' allegations regarding defendants' violations of the ADA, defendants make three arguments. First, they contend that the 1020 Andrews Drive facility is only two stories high, and that it accordingly falls within the "elevator exception" to Title III of the ADA, codified at 42 U.S.C. § 12183(b). That provision states that "[s]ubsection (a) of this section[7] shall not be construed to require the installation of an elevator for facilities that are less than three stories . . . unless [one of four listed conditions is met]."[8] 42 U.S.C. § 12183(b). Defendants note that the regulations promulgated by the Department of Justice ("DOJ")–the entity responsible for implementing the ADA–define "story" as "[t]hat portion of a building included between the upper surface of a floor and upper surface of the floor or roof next above." 28 C.F.R. § 36, App. A. The regulations go on to state that "[i]f such portion of a building does not include occupiable space, it is not considered a story for purposes of these guidelines. There may be more than one floor level within a story as in the case of a mezzanine or mezzanines." *Id.* Though defendants concede that a warehouse is attached to the building, and that this structure is "on an intermediate level" (i.e. between the first and second floors of the office space), they argue that this level that is adjacent to the building "is not a story, as defined by the [DOJ] Guidelines." Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Defs.' Memo. in Support") at 4. They note that both Ferguson and architect Art

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[7] It is § 12183(a) on which plaintiffs base their argument that defendants were required to install during the building's construction and subsequent alterations some means of accessing the facility's upper portions.

[8] Specifically, these conditions are as follows: the building is a shopping center, a shopping mall, the office of a health care provider, or "the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities." § 12183(b). None of these conditions applies to the 1020 Andrews Drive building.

Olsen testified that the building was "designed and built to contain only two stories," *id.*, and that Olsen further stated that "the warehouse is actually considered to be a separate building, as different codes apply to that structure." *Id.* Accordingly, defendants aver, at the time of both its construction and subsequent alterations, the 1020 Andrews Drive facility was exempt from the requirement that an elevator be installed so as to make the facility accessible to disabled individuals. *See* 42 U.S.C. § 12183(b).

Plaintiffs respond to this argument by asserting that the warehouse, or "disputed floor" as they refer to it, actually constitutes a third floor of the 1020 Andrews Drive facility, and that defendants consequently cannot avail themselves of the elevator exception. Pls.' Memo. in Support at 18. They aver that it is undisputed that this "floor" is occupiable, as "numerous employees" routinely worked there, and that the space is thus consistent with the definition of "story" contained in 28 C.F.R. § 36, App. A. Pls.' Memo. in Support at 18. Moreover, they claim that the floor space in question is not a "mezzanine," as per the Building Officials and Code Administrators ("BOCA") building code adopted by West Goshen Township.[9] *See id.* That code defines a mezzanine as "an intermediate level or levels between the floor and ceiling of any story with an aggregate floor area of not more than one third of the area of the room in which the level or levels are located." BOCA § 502.1. Because the floor area of the "disputed floor" exceeds one-third of the area of the room in which it is located, plaintiffs contend, it

[9] Plaintiffs' argument as to the inapplicability of the elevator exemption appears to incorporate implicitly the assumption that the warehouse space must be either a mezzanine or a story.

cannot be a mezzanine and instead must be a story.[10] *See* Pls.' Memo. in Support at 18.

Defendants' second argument concerning the ADA violations alleged by plaintiffs is that, regardless of the applicability of the elevator exception, they did not "discriminate" against plaintiffs as per 42 U.S.C. § 12183(a)(1) by failing to initially construct the 1020 Andrews Drive facility in a manner that rendered it accessible to disabled individuals. Defs.' Memo. in Support at 4-5. Indeed, they contend that the ADA's new construction provision does not apply at all to their building. *See id.* § 12183(a)(1) indicates that discrimination for purposes of 42 U.S.C. § 12182(a) includes "a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990 that are readily accessible to and usable by individuals with disabilities . . . ." 42 U.S.C. § 12183(a)(1). As explained by the DOJ regulations, this standard translates into a requirement that new construction "for first occupancy after January 26, 1993" be accessible to disabled people. 28 C.F.R. § 36.401(a)(1). The DOJ specifies two criteria that must be satisfied if a building is to be considered as having been designed and constructed for first occupancy after January 26, 1993. First, "the last application for a building permit or permit extension for the facility is certified to be complete, by a State, County, or local government after January 26, 1992 (or, in those jurisdictions where the government does not certify completion of applications, if the last application for a building permit or permit extension

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[10] Plaintiffs also assert that "the other requirement for the elevator exemption," that each story must have less than 3000 square feet, also is unsatisfied here. Yet this is not an additional condition necessarily satisfied if the elevator exemption is to apply, but rather is an alternative basis for the applicability of the exemption. *See* 42 U.S.C. § 12183(b). Put differently, the elevator exemption applies if the building is less than three stories high *or* has less than 3000 square feet. Defendants do not assert the latter as a basis for their summary judgment motion, and consequently plaintiffs' argument is inapposite to the argument raised by defendants.

for the facility is received by the State, County, or local government after January 26, 1992)." 28 C.F.R. § 36.401(a)(2)(i). Second, the first certificate of occupancy for the building must have been issued after January 26, 1993. 28 C.F.R. § 36.401(a)(2)(ii). Defendants assert that their last application for a building permit was submitted to West Goshen Township on May 29, 1991, *see* Pls.' Motion at Exhibit 4, and that, accordingly, the DOJ's first criterion is unsatisfied in this case. They therefore conclude that the 1020 Andrews Drive facility falls outside the scope of 42 U.S.C. § 12183(a)(1). Defs.' Memo. in Support at 5.

Plaintiffs retort by contending that although defendants' final building permit application was submitted on May 29, 1991, this is so only because defendants failed to seek a later building permit for the tenant fit outs as they were required to do under Pennsylvania law. Pls.' Memo. in Support at 13-16. Had defendants sought this later permit, plaintiffs' argument continues, they necessarily would have done so "after November 2, 1992–the date on which L & I approved the building plans for the fit outs." *Id.* at 16. If so, plaintiffs conclude, this would have satisfied the requirement set forth in 28 C.F.R. § 36.401(a)(2)(i), and rendered the 1020 Andrews Drive facility subject to the new construction requirements of 42 U.S.C. § 12183(a)(1). Pls.' Memo. in Support at 13-16.

Defendants third contention regarding their alleged ADA violations is that just as they were not required by 42 U.S.C. § 12183(a)(1) to make the building accessible to disabled people when it was initially constructed, they likewise were not required to do so pursuant to 42 U.S.C. § 12183(a)(2) when alterations to the building subsequently were undertaken. That provision requires that when alterations are made to a building such that the usability of the facility is affected, the altered portions must be made accessible to disabled persons, including

those who use wheelchairs. It further provides that when alterations are undertaken in a manner that affects the usability of, or access to, an area of the facility that contains a "primary function,"[11] the path of travel to the altered area and to bathrooms, telephones and drinking fountains that serve the area must be made readily accessible to individuals with disabilities, provided that such accommodations are "not disproportionate to the overall alterations in terms of cost and scope." 42 U.S.C. § 12183(a)(2). DOJ regulations specify that "[a]lterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area." 28 C.F.R. § 36.403(f). Seizing on this definitional provision, defendants assert that the alterations made to the building were limited to a "fit-out" of the second floor of the building "in anticipation of occupancy by . . . Nichols." Defs.' Memo. in Support at 6. The total cost of these modifications, according to defendants, was "approximately $37,000." *Id.* The estimated cost of installing an elevator, they continue, ranges from $25,000 to over $50,000, and therefore vastly exceeds the 20% threshold. *See id.* This, defendants assert, exempts them from the requirements of § 12183(a)(2).

Plaintiffs counter this assertion by contending that, as specified by Department of

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[11] "Primary function" is defined as "a major activity for which the facility is intended. Areas that contain a primary function include, but are not limited to, the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public accommodation or other private entity using the facility are carried out. Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, corridors, and restrooms are not areas containing a primary function." 28 C.F.R. § 36.403(b).

Justice's interpretation of the ADA set forth in its "Technical Assistance Manual" ("TAM"), "'[w]henever an area containing a primary function is altered, other alterations to that area (or to other areas on the same path of travel) made within the preceding three years are considered together in determining dis-proportionality.'" Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pls.' Memo. in Opposition") at 3 (quoting TAM § 6.2000). The TAM further indicates that "[o]nly alterations after January 26, 1992 are counted." TAM § 6.2000. Plaintiffs note that defendants received an estimate for a new elevator that specified a price of $27,500. *Id.* at 4. Accordingly, they assert that under the DOJ guidelines, if the total amount spent during the three years prior to and including the period during which the "tenant fit outs" were completed exceeded $137,500, defendants would have been obligated under 42 U.S.C. § 12183(a)(2) to add an elevator. *See id.* Plaintiffs assert that defendants spent "substantially in excess" of this amount during the relevant period, and thus that their obligations under § 12183(a)(2) were triggered. *See id.* Plaintiffs also allege that if defendants could have procured a less expensive elevator than the one for which they received the $27,500 estimate, the expenditure threshold above which installation of an elevator would have been required would have been lessened proportionally. *See id.*

Plaintiffs raise one final, creative argument against defendants' motion for summary judgment insofar as it pertains to their ADA claims. They aver that the legislative history of § 12183 reveals that even if the elevator exemption otherwise would apply to a given structure, if the building owner nonetheless opts voluntarily to install an elevator it must be ADA-compliant. Pls.' Memo. in Opposition at 5. Plaintiffs claim that by installing an elevator shaft without an elevator, defendants have installed a non-ADA compliant elevator. *Id.*

As for plaintiffs' allegation that they violated the PPHA, defendants aver that at the time of the 1020 Andrews Drive building's construction, § 1455.1 did not mandate that elevators be installed in new construction. Although a requirement that buildings (like the 1020 Andrews Drive facility) with more than 12,500 square feet of total floor area be constructed in a manner that renders them accessible to handicapped individuals was added in 1994, defendants contend, the 1020 Andrews Drive facility was "grandfathered in" under the old regulations, and thus is exempt from Pennsylvania's regulations pertaining to the installation of elevators. *See* Defs.' Memo. in Support at 7. They argue that the inapplicability of the PPHA's elevator requirement to the Andrews Drive building at the time of its construction is further evidenced by the facts that the building plans for the facility, neither of which featured an elevator, were approved by both the Commonwealth and West Goshen Township, and that both of these entities ultimately issued certificates of occupancy for the building. *See id.*

Plaintiffs respond to this segment of defendants' motion by asserting that the regulation requiring that new construction be handicapped-accessible actually became effective on February 18, 1989, not in 1994 as defendants contend. *See* Pls.' Memo. in Opposition at 7 (citing 71 Pa. Cons. Stat. § 1455.1). They argue that because the building indisputably was constructed after 1989, and because it exceeds 12,500 square feet of total floor area, it is subject to the accessibility requirements currently codified at § 1455.1. *See id.* As for defendants' argument that approval by L & I and West Goshen Township connotes compliance with the PPHA, plaintiffs raise two counter-arguments. First, they note that the plans that were approved showed an elevator shaft. *See id.* at 9-10. Plaintiffs assert that it defies credulity to posit that a building inspector scrutinizing these plans would have believed anything other than that the

facility would feature an elevator, and that the approval of the plans therefore reveals nothing about the acceptability of the building's lack of accommodations for disabled persons. *See id.* at 10. Second, plaintiffs argue that, as a matter of law, agency "approval of conduct that it oversees does not foreclose a court from finding a violation of the law that the agency implements." *Id.* (citing *Drain v. Covenant Life Ins. Co.*, 712 A.2d 273 (Pa. 1998)).

Defendants also contest plaintiffs' claim that by violating the ADA and PPHA, they violated the lease agreement as well. Defs.' Memo. in Support at 7-8. This claim, of course, would be rendered meritless if defendants' arguments as to their compliance with the ADA and PPHA are well-founded.[12] Yet in addition to contesting plaintiffs' allegations of state and federal statutory violations, defendants assert that the lease expressly excludes an elevator and that plaintiffs were fully aware that the building was not equipped with an elevator prior to signing the lease. *See id.* at 8.

Plaintiffs respond by reiterating their contention that the facility does not comply with the ADA. They further assert that even if the lease agreement allocated responsibility for ADA-compliance to Nichols (the only plaintiff that is a party to that agreement), this does not insulate defendants from liability to third parties–such as Thompson and Van Dalen–for ADA violations. *See* Pls.' Memo. in Opposition at 12. Plaintiffs also contest as a matter of fact whether the elevator clause of the lease actually was validly removed from the agreement, because while it is crossed out, this alteration is not initialed as are other changes to the lease.

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[12] Although defendants do not make this argument explicitly, plaintiffs' claim sounding in defendants' violation of their common law duty to lease an ADA- and PPHA-compliant building similarly would be rendered moot if defendants' arguments regarding their compliance with those statutory mandates are well-founded.

See id. Finally, plaintiffs assert that the DOJ's TAM indicates that a tenant does not bear responsibility for making alterations to areas of a non-ADA compliant building that are not under its control. *See id.* In this case, they note, the lease specifically designates the elevators[13] as being under the control of defendants. *See* Amended Complaint at Exhibit 1, ¶ 5(c).

Defendants next contend that plaintiffs are unable to satisfy the legal criteria for stating a claim sounding in tortious interference with prospective contractual relations. Specifically, they assert that "the [p]laintiff[s] . . . received no solid offers to sublease the building." Defs.' Memo. in Support at 9. The allegation, it seems, is that plaintiffs have failed to establish the existence of prospective contractual relations in the first place, and that therefore there was nothing for the defendants to have interfered with. *See id.* Defendants also contend that plaintiffs have failed to demonstrate the existence of a genuine issue of fact regarding defendants' intent to harm them, which also is a prerequisite to the establishment of a tortious interference with prospective contractual relations claim. *See id.* Accordingly, defendants contend that this claim should be dismissed.

Plaintiffs counter by asserting that there exist genuine issues of material fact regarding the satisfaction of each of the elements of this tort, including the existence of prospective contractual relations and the intent with which defendants acted in this case. This, plaintiffs assert, precludes the court from granting defendants' motion for summary judgment as to this claim.

As to the assertions made by Van Dalen and Thompson regarding the worsening of their disabilities, defendants argue that these claims also should be dismissed because there

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[13] The elevators to which this provision refers are, as stated, non-existent.

simply is no evidence that either of these plaintiffs is "disabled" within the meaning of that term as defined by the ADA, or that either was discriminated against on the grounds of disability. Defs.' Memo. in Support at 10-12.

Plaintiffs contest defendants on the facts. They cite the deposition testimony of Van Dalen and Thompson concerning limitations on their respective abilities to walk as support for the proposition that both actually are "disabled." *See* Pls.' Memo. in Opposition at 18-23. Specifically, plaintiffs assert that because walking is a major life activity, and because both Thompson and Van Dalen's respective abilities to walk are substantially impaired, they must be deemed disabled. *See id.* at 23 (citing 29 C.F.R. § 1630.2(i)).

Finally, defendants assert a counterclaim against Nichols for indemnification in the event that Van Dalen or Thompson suffered an injury on the premises (i.e., an exacerbation of their disabilities, as alleged by plaintiffs). Defendants assert that "[u]nder the terms of the lease . . . Nichol[s] agreed to indemnify and relieve [d]efendants from all liability and expense by reason of any loss, damage or injury to any person which may arise from any cause whatsoever on the premises." Defendants' Answer to Plaintiffs' Amended Complaint ¶ 112. Therefore, they contend, if either of the individual plaintiffs ultimately prevails in this action, Nichols is contractually obligated to indemnify defendants in the amount of any judgment imposed.

On September 18, 2001, plaintiffs filed a cross motion for partial summary judgment 1) dismissing defendants' counterclaim with prejudice; 2) declaring that the 1020 Andrews Drive facility is subject to the "new construction" requirements of Title III of the ADA; 3) declaring that the building was required under the ADA and PPHA to have an elevator or other means of accessability to the upper floors of the building and that actually is inaccessible;

4) declaring that as a result of these federal and state statutory violations defendants constructively evicted Nichols, thereby terminating its obligations under the lease as of the date on which Nichols vacated the premises; 5) setting aside the lease; 6) ordering defendants to refund all rent payments made subsequent to the date on which Nichols vacated the premises; 7) declaring that Nichols is a "prevailing party" under the ADA and awarding it attorney's fees; and 8) reserving the claims of Thompson and Van Dalen for trial.

On January 8, 2002, after reviewing the parties' cross motions, the court ordered plaintiffs and defendants to submit memoranda of law addressing the question of each plaintiff's standing to advance a claim pursuant to Title III of the ADA. Both plaintiffs and defendants have done so, and this question is ripe for disposition.[14]

II Legal Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court is not to resolve disputed factual issues, but rather should determine whether there are genuine, material factual issues that require a trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

[14] Plaintiffs also have requested oral argument on the issue of their standing to pursue their ADA claims, but I conclude that such is unnecessary, as the court has within its possession all information necessary to reach an informed answer to the standing question.

III Discussion

Before examining the merits of the cross-motions at bar, it is necessary to determine whether plaintiffs possess standing to raise the ADA claims contained in count I of their amended complaint. Indeed, I am obligated to examine–*sua sponte* if necessary–whether the prerequisites for constitutional standing have been satisfied in this case, as the existence of Article III standing is an issue that is jurisdictional in dimension. *See Juidice v. Vail*, 430 U.S. 327, 331 (1977) ("Although raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III, to seek injunctive relief in the District Court."); *Chong v. Dist. Dir., I.N.S.*, 264 F.3d 378, 383 (3d Cir. 2001) ("[T]he Supreme Court has held that courts must decide Article III standing issues, even when not raised by the parties, before turning to the merits." (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998))). Moreover, although no similar obligation exists with respect to non-constitutionally derived standing prerequisites, it would be appropriate for the court to evaluate on its own initiative whether these requirements are satisfied as well. *See Liberty Res., Inc. v. SEPTA*, 155 F. Supp.2d 242, 248 n.14 (E.D. Pa. 2001) (citing *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 838 (3d Cir. 1996)). Yet even disregarding the propriety of raising *sua sponte* the issue of plaintiffs' standing, defendants have submitted a memorandum of law pursuant to the court's January 8, 2002 order–and in response to plaintiffs' memorandum regarding standing–in which they contend that plaintiffs fail to satisfy both constitutional and non-constitutional standing requirements. *See* Defendants' Reply Memorandum of Law Regarding Standing ("Defs.' Standing Memo.") at 3-16 (arguing that plaintiffs lack constitutional standing to assert their ADA claims); *id.* at 16 (attacking plaintiffs'

argument that the ADA provides for blanket standing to the limits of Article III). For this reason as well, then, I will examine these issues.

In order to establish standing under Art. III of the United States Constitution, a litigant must satisfy three criteria. First, the plaintiff must have suffered an "injury in fact," or "an invasion of a legally protected interest which is . . . concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, the plaintiff must demonstrate the existence of a causal connection between the injury and the conduct complained of, *see id.*, and finally, it is necessary to establish that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[15] *Id.* at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

Additionally, it is worth noting that where, as here,[16] a plaintiff seeks prospective injunctive relief, he or she must demonstrate a "real and immediate threat" of injury in order to satisfy the "injury in fact" requirement. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103-04 (1983). Indeed, as indicated by the Third Circuit, "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . .' In order to obtain

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[15] As stated by the *Lujan* Court, the burden lies with plaintiffs to establish the satisfaction of these criteria. *See* 504 U.S. at 531 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)). Unsurprisingly, the quantum of proof needed to establish standing increases as the case moves through the "successive stages of the litigation." *Id.* (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990)). Thus, at the summary judgment stage, "the plaintiff can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken as true." *Id*. (quoting Fed. R. Civ. P. 56(e)).

[16] Under Title III, only injunctive relief is available. *See* 42 U.S.C. § 12188; *Adelman v. Acme Markets Corp.*, 1996 WL 156412, at *2 (E.D. Pa. Apr. 3, 1996).

standing for prospective relief, the plaintiff must 'establish a real and immediate threat that he would again be [the victim of the allegedly unconstitutional practice].'" *Brown v. Fauver*, 819 F.2d 395, 400 (3d Cir. 1987) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974) and *Lyons*, 461 U.S. at 105).

In *Lujan*, for example, the plaintiff environmental groups sought to enjoin a regulation enacted pursuant to the Endangered Species Act. That regulation mandated that all federal agencies "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ." 504 U.S. at 558. The critical question confronting the Court was one of standing, and specifically whether the plaintiffs were able to demonstrate that they had suffered an injury in fact due to the regulation's operation.[17] *See* 504 U.S. at 562-63. The groups attempted to satisfy this criterion through the submission of two affidavits. The first stated that the affiant had traveled to Egypt to observe the Nile crocodile in its native habitat, and "intended" to return. *Id.* at 563. The second asserted that the affiant had traveled to Sri Lanka in order to observe the habitat of endangered species, and while she had abstract plans to return, she could not state anything more specific regarding those plans than that she intended to return "in the future." *Id.* at 564. The Court

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[17] The specific challenge in *Lujan* was to the imposition by the Secretary of the Interior of a limitation on the scope of this protective regulation to the United States and the high seas, and to the resultant exclusion from the measure's ambit actions taken overseas that threatened endangered species or their habitats. Accordingly, to establish standing to challenge this regulation, it was necessary for the *Lujan* plaintiffs to demonstrate that they would be affected in a particularized way by the destruction of the overseas habitat of a given endangered species. To do so, they needed to establish that it was sufficiently likely that they would be physically present in that habitat in the future.

concluded that "[s]uch 'some day' intentions–without any description of concrete plans, or indeed even any speculation of *when* the some day will be–do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* (emphasis original). Accordingly, the environmental groups lacked Article III standing to challenge the regulation in question.

Like several other courts of appeals, the Third Circuit has held that these principles are equally applicable in the context of Title III of the ADA. *See Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (holding that the injury complained of was actual and imminent where the plaintiff was "sure to" suffer the conduct that allegedly constituted disability-based discrimination "absent an injunction"); *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001); *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000) (concluding that proof of an intent to return to the place of injury "some day" is insufficient to establish standing under Title III, and that a plaintiff must instead prove that he or she "would visit the building in the imminent future" but for the failure to comply with the ADA); *Freydel v. New York Hosp.*, 242 F.3d 365 (unpublished disposition), 2000 WL 1836755 (2d Cir. Dec. 13, 2000) (holding that standing was lacking under Title III where the plaintiff established only that she "may" be referred to the defendant hospital in the future). Moreover, numerous district courts have adopted this analytical framework in the Title III context. *See Association for Disabled Ams. v. Claypool Holdings, LLP*, 2001 WL 1112109, at **18-19 (S.D. Ind. Aug. 6, 2001) (collecting cases).

As applied to the instant matter, these principles yield the conclusion that Thompson and Van Dalen lack constitutional standing to assert their ADA claims. A preliminary problem for both of the individual plaintiffs is that their connection to the 1020 Andrews Drive

facility was Nichols's presence within it. Yet, as stated, Nichols has moved out of the building and into a single story facility located at 1025 Andrews Drive. *See* Amended Complaint ¶ 24 ("Nichols had to vacate the premises and move to a building that was ADA compliant to accommodate Van Dalen, Thompson, and others . . . ."). Accordingly, it does not appear likely that either of the individual plaintiffs in this case will be present within the facility in the foreseeable future.

Furthermore, taken against this factual background, there are additional considerations that render it insufficiently likely that either Thompson or Van Dalen will again be subject to the conditions in the 1020 Andrews Drive building. Specifically, in April, 2001, Thompson moved to South Carolina. *See* Deposition of Carol Ann Thompson ("Thompson Dep.") at 4-5. Moreover, Thompson's ability to walk has deteriorated significantly since Nichols vacated the 1020 Andrews Drive facility. She testified at her deposition that she is unable to walk more than three-quarters of a city block, and that she had trouble getting around the one floor of the 1025 Andrews Drive building. *See id.* at 48-50. Finally, and perhaps most importantly, Thompson, who is 60 years old, currently is on long-term disability leave which, she asserts, should last until she retires at age 65. *See id.* at 62.

Plaintiffs attempt to demonstrate that Thompson continues to suffer an "injury in fact" stemming from the building's alleged non-compliance with the ADA by submitting an affidavit signed by Thompson indicating that in the event that Nichols is acquired by another company she would be willing, upon receiving the approval of her doctor, to return to the 1020 Andrews Drive building if an elevator was installed. *See* Memorandum of Plaintiffs Regarding the Standing Issue ("Pls.' Standing Memo.") at Exhibit 2, ¶¶ 5-6. In this vein, plaintiffs further

assert that Point Five Technologies, Inc. ("Point Five") is prepared to use Nichols's former space if it is altered so as to comply with the ADA, and that it is willing to offer a job to Thompson upon moving into that space. Pls.' Standing Memo. at 1, 5.

However, Thompson has no actual offer of employment from Point Five in hand; she states merely that she "understand[s] that [Point Five] may offer [her] . . . the opportunity to return to . . . the 1020 Andrews Drive facility." Pls.' Standing Memo. at Exhibit 2, ¶ 5; *see also id.* at Exhibit 1, ¶ 6 (affidavit of R. Donald Avellino, Chief Executive Officer of Point Five, stating that "Point Five's hiring policy is to offer a position first to past employees, including Carol Thompson . . ."). Additionally, Point Five has made no commitment to occupy Nichols's former space upon the installation of an elevator in the 1020 Andrews Drive facility, nor is there any indication that Nichols has made any request to defendants regarding the assignment of its lease.[18] Indeed, Point Five has not entered into any agreement with respect to 1020 Andrews Drive building at all. *See id.* at Exhibit 1, ¶ 5 ("Point Five is currently evaluating office space in the West Chester area for returning to significant, active operations."). Moreover, it is significant that Thompson was unable to negotiate the one floor of the 1025 Andrews Drive building, and was forced to take long-term disability leave following Nichols's move to that facility. This indicates that the installation of an elevator into the 1020 Andrews Drive facility would not enable Thompson to work there.[19] Thus, in light of the evidence recounted above–indeed, even

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[18] Pursuant to the lease, Nichols is obligated to obtain the written consent of defendants prior to subleasing or assigning its space in the 1020 Andrews Drive building. *See* Lease ¶ 4(a).

[19] In legal terms, this factor impacts the redressability of Thompson's injury. *See Lujan*, 504 U.S. at 561 (stating that for constitutional standing to exist, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'")

in the absence of any other evidence–Thompson's affidavit and her allegations regarding the potential job offer from Point Five are insufficient to establish that she has the *concrete and particularized* plans to return to the 1020 Andrews Drive facility that are required by *Lujan*.

Plaintiffs contend that Van Dalen suffers a continuing injury in fact because, although he lives in Texas, he spends half of each month at Nichols's 1025 Andrews Drive facility, and because "the absence of an elevator is a barrier to Nichols' ability to return to its office at 1020 Andrews Drive." Pls.' Standing Memo. at 10. In other words, plaintiffs assert that Van Dalen would spend half of his working hours in the 1020 Andrews Drive building–as opposed to the 1025 Andrews Drive facility, where he currently spends them–but for its ADA non-compliance.

Taken alone, these allegations are insufficient to demonstrate that Van Dalen suffers an injury in fact. Indeed, at the core of the *Lujan* holding is the proposition that a party must have definite plans to do or visit "X" for that party to have standing to seek equitable relief with respect to the conditions of "X." In fact, in *Lujan*, it bears reiterating, the affiants affirmatively indicated that they did intend to return to Egypt and Sri Lanka respectively, though neither indicated precisely when, and this was held to fall short of the requisite showing. Thus, as applied to the present facts, the import of *Lujan* is that Nichols must have concrete plans to return to the 1020 Andrews Drive facility upon the rectification of the building's ADA non-compliance in order to confer upon Van Dalen standing in the present matter. However, plaintiffs aver that the harm suffered by Nichols as a product of this non-compliance is not that it

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(citations omitted).

is precluded from re-entering its former space, but rather that it is unable to sublease the premises because they violate the ADA and that it is unable to sell the lease on the 1020 Andrews Drive building to Point Five.[20] Indeed, whereas Nichols previously had asserted that it "must . . . decide whether to move back into the premises . . .," Amended Complaint ¶ 30, it does not indicate in its memorandum regarding standing that this remains a possibility.[21] These assertions indicate affirmatively that Nichols does not intend to reenter its former space.

The unlikelihood that Nichols will return to the 1020 Andrews Drive facility, even upon its becoming ADA-compliant, is further evidenced by the deposition testimony of Van Dalen. He stated that the move to the building located at 1025 Andrews Drive was a product of several considerations, including the fact that he experienced pain when he used the steps, *see* Van Dalen Dep. at 57, but also because the lease terms were in his opinion "very one-sided towards the landlord," *see id.* at 39-40, and because the 1020 Andrews Drive building did not permit all of the Nichols employees to be on the same floor. *See id.* at 57. In fact, this latter rationale appears to have been the dominant force behind the decision to change locations, as evidenced by the following exchange from Van Dalen's deposition:

Q: Why did [Nichols management] decide to move?

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[20] Notably, although plaintiffs contend that Point Five would extend a job offer to Thompson, they make no such allegation with respect to Van Dalen. Accordingly, I will assume that the use by Point Five of Nichols's former space would not entail as a consequence Van Dalen's reintroduction into that space.

[21] Although, as stated, Nichols asserts that the failure of its former space to comply with the ADA "is a barrier to [its] ability to return to its office . . .," Pls.' Standing Memo. at 10, this assertion is distinguishable from the proposition that the company desires or intends to return to the 1020 Andrews Drive building.

A: Well, because that building didn't suit us.

Q: Why didn't the building suit you?

A: Well, because Ferguson wouldn't give us the bottom floor, that's why. People needed to be together.

Q: Were you aware of any other reason to move?

A: No.

Van Dalen Dep. at 56-57. Notably, Morgantini[22] testified similarly:

Q: Did Nichols have any plan to move back into the [1020 Andrews Drive] building if an elevator was installed?

A: None that I'm aware of.

Q: Was that because the building couldn't accommodate the size you needed, the space you needed?

A: Correct.

Deposition of Dean F. Morgantini ("Morgantini Dep.") at 60.

Even if Nichols's former building were made accessible to disabled persons, then, this would not rectify the shortcomings of that facility that apparently spurred Nichols's decision to abandon it. Accordingly, I conclude that plaintiffs have not demonstrated that Nichols (and thus Van Dalen) has a concrete plan to return to the 1020 Andrews Drive facility, even upon the installation of an elevator therein. Van Dalen, like Thompson, thus does not continue to suffer

[22] Morgantini was, as stated, the president of Nichols at the time of the move from the 1020 Andrews Drive building to the 1025 Andrews Drive facility.

an injury in fact from that building's alleged non-compliance with Title III of the ADA, and as such he lacks constitutional standing to assert claims pursuant to that Title based on this asserted non-compliance.

For the foregoing reasons, defendants' motion will be granted as to the ADA claims of the individual plaintiffs.

This leaves the question of whether Nichols possesses standing to advance its ADA claims. Nichols makes two distinct arguments in support of the proposition that it does have standing to raise claims pursuant to Title III. First, it claims that it enjoys third party standing to assert the rights of Van Dalen and Thompson. *See* Amended Complaint ¶¶ 24-26. Significantly, there are several prudential–as opposed to constitutional–limitations that ordinarily restrict a party's standing to assert the rights of third parties. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). But such prudential restrictions are likely inapplicable in the context of the ADA, *see infra*, and, accordingly, it appears that Nichols may advance a claim on behalf of an individual or entity whose ADA rights have been violated. However, even assuming that prudential standing requirements are not applicable to ADA claims, this does not mean that Nichols may pursue an ADA claim on behalf of a party that itself lacks an enforceable right under that statute. Because they fail to demonstrate that they presently suffer an injury in fact, *see Lujan*, 504 U.S. at 562-64, as that requirement is set forth in the *Lyons* test for standing to seek injunctive relief, neither Thompson nor Van Dalen possesses standing to assert their ADA claims. Accordingly, Nichols cannot bring a claim pursuant to that statute on behalf of

either of the individual plaintiffs in this case.[23] Indeed, the proposition that prudential standing requirements do not apply in the context of the ADA means only that a party that possesses constitutional standing will not be precluded from advancing an ADA claim because he or she fails to satisfy a judicially-fashioned standing requirement. It does not mean that where a party fails to meet an Article III standing requirement another party–such as Nichols–can assert the otherwise non-justiciable ADA claim on his or her behalf.

Second, Nichols argues that it possesses standing to assert a Title III claim on its own behalf based on injuries it allegedly suffered–i.e., its inability to sublease its former space and to sell some of its assets, including the right to use that space, to Point Five–as a result of defendants' failure to comply with the mandates of §§ 12182 and 12183. In support of this argument, plaintiffs note that nearly every other court to consider the issue of standing under the ADA[24] has determined that prudential limitations thereon are inapplicable in the context of this statute. *See* Pls.' Standing Memo. at 13-14 (citing *Innovative Health Sys.*, 117 F.3d at 48 and

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[23] This conclusion is perfectly consistent with the Second Circuit's holding in *Innovative Health Sys., Inc. v. City of White Plains* that the fact "that [the institutional plaintiff] is not granted legal rights under [the ADA] . . . 'hardly determines whether [it] may sue to enforce the rights of others.'" 117 F.3d 37, 47 (2d Cir. 1997) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979)). If the "others" at issue in this case–namely Thompson and Van Dalen–presently suffered an injury in fact, then it is likely that Nichols could sue to compel defendants to redress that injury. But neither individual plaintiff actually suffers from such an injury, and thus the possibility identified by the Second Circuit is simply inapplicable to the present factual circumstances.

[24] In referring to standing to seek injunctive relief under the ADA, I will not distinguish among claims arising under Titles I, II and III of that statute. *See generally Kinney v. Yerusalim*, 9 F.3d 1067, 1073 n.6 (3d Cir. 1993) ("'The Committee intends . . . that the forms of discrimination prohibited by [Title II] be identical to those set out in applicable provisions of Titles I and III of this legislation.'" (quoting H.Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 367)).

Liberty Res., 155 F. Supp.2d at 249-50). Accordingly, Nichols avers, if it is able to satisfy the three part *Lujan* test, then the standing inquiry is finished. Plaintiffs then proceed to address the *Lujan* criteria seriatim, arguing that each is fulfilled.

As a preliminary matter, it seems evident that Nichols is correct in positing that it continues to suffer a remediable injury in fact that was caused by[25] the 1020 Andrews Drive building's alleged non-compliance with the ADA. Because it is unable to sublet or sell the right to occupy its former space, Nichols must pay rent on both the 1020 and 1025 Andrews Drive facilities. Assuming that its allegations as to the cause of this burden of paying double rent are well-founded, then it is attributable to defendants' failure to make the 1020 Andrews Drive building ADA-compliant. Moreover, the installation of an elevator would redress this injury, as it would enable Nichols to escape the burden of paying two rents.

Despite plaintiffs' contrary contentions, however, Nichols's satisfaction of the requirements imposed by Article III is insufficient to confer upon it standing to assert its Title III claims. Indeed, not every entity that is being tangibly harmed by a Title III violation has standing to sue under that provision. This is so not due to the operation of any judicially fashioned standing limitation, but rather because Congress itself has limited the class of parties on which

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[25] Defendants argue that they did not cause Nichols's harm, but rather that Nichols caused its own harm. They contend that Nichols, by its own account, was not forced out of the 1020 Andrews Drive building, and instead moved because it wanted more space. While this argument might be persuasive if Nichols simply had vacated its former space and then argued that defendants were responsible for its having to pay two rents, that is not Nichols's sole claim. Plaintiffs assert instead that Nichols is unable to sublease or sell the right to the space, a harm that, assuming their allegations to be well-founded, is attributable to defendants. Indeed, even if Nichols never had left the 1020 Andrews Drive facility, the present claim still would be possible. Accordingly, defendants' argument as to causation is unavailing at the summary judgment phase.

that portion of the ADA bestows rights. Specifically, Title III grant rights only to disabled individuals and entities that have a known association or relationship with an individual with a known disability.[26]

Under plaintiffs' formulation, this limitation would be rendered irrelevant, as any party who is in any way injured by a failure to comply with Title III's requirements would be able to bring suit thereunder, regardless of whether it was discriminated against based on its disability or its association with a disabled individual. Indeed, were the court to adopt the proposition urged by plaintiffs, a non-disabled but sensitive person who suffers emotional distress knowing, or seeing, that a particular disabled person is suffering continuing discrimination within the meaning of Title III would possess standing to enforce that provision.

This, however, is not the proposition set forth in either *Innovative Health Sys.* or *Liberty Resources*, both of which are cited extensively by plaintiffs in support of their standing argument. Both of these cases concerned standing under Title II of the ADA, which, on its face, grants rights only to "qualified individual[s] with a disability."[27] 42 U.S.C. § 12132. In both

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[26] Title III grants to disabled individuals and classes thereof the following rights: (1) not to be denied the opportunity to "participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity," *see* 42 U.S.C. § 12182(b)(1)(A)(i); (2) not to be denied an equal opportunity to participate in or benefit from those goods, services, etc. as is afforded to non-disabled individuals, *see* § 12182(b)(1)(A)(ii); and (3) not to be denied access to the same goods, services, etc. as is afforded to non-disabled individuals unless the provision of a separate benefit is necessary to provide the disabled person with an equally effective good, service, etc., *see* 42 U.S.C. § 12182(b)(1)(A)(iii). It also grants to entities that have a known relationship or association with disabled individuals the right not to be denied equal goods, services, etc. because it is known to associate or to maintain a relationship with one or more disabled individuals. *See* § 12182(b)(1)(E).

[27] Title II lacks the provision contained in Title III that confers on entities that associate with disabled persons the right not to suffer discrimination on the basis of that

cases, the plaintiff was an entity that provided services to disabled persons, and in both the plaintiff sued on behalf of the disabled individuals with whom it had a relationship.[28] *See Innovative Health Sys.*, 117 F.3d at 46-47; *Liberty Resources*, 155 F. Supp.2d at 247-50. Moreover, both courts' standing analyses were significant in that they interpreted the ADA to abolish prudential limitations on a party's standing thereunder. Put differently, after examining the enforcement provisions attendant to Title II and the regulations implementing that Title, these courts concluded that Congress intended to override all judicially created barriers to a party's assertion of an otherwise cognizable ADA claim. *See Innovative Health Sys.*, 117 F.3d at 47; *Liberty Resources*, 155 F. Supp.2d at 249-50. Although I am aware that not every court considering this question has reached the same conclusion, *see, e.g., Kessler Inst. for Rehab., Inc. v. Mayor and Council of Essex Fells*, 876 F. Supp. 641, 653 (D.N.J. 1995), I will assume for the purpose of the present analysis that these courts were correct in deciding as they did. Thus, for example, whereas a party would not otherwise be able to "rest his claim to relief on the legal rights or interests of third parties," *Warth v. Seldin*, 422 U.S. 490, 499 (1975), I will proceed on the assumption that Congress has done away with this and all other prudential standing doctrines in the ADA context. *See AIDS Healthcare Found. v. Belshe*, 1998 WL 1157405, at *5 (C.D. Cal. Dec. 8, 1998) (stating in the context of the ADA that "'persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others'"(quoting *Warth*, 422 U.S. at 501)).

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relationship. *See* 42 U.S.C. §§ 12132 and 12182(b)(1)(E).

[28] In *Liberty Resources*, the plaintiff sued on its own behalf as well. *See* 155 F. Supp.2d at 247.

Yet the inapplicability of prudential standing requirements to ADA claims is conceptually divorced from the question of whether Nichols has statutory standing under the ADA. *See generally Washington-Dulles Transp., Ltd. v. Metro. Washington Airports Auth.*, 263 F.3d 371, 377 (4th Cir. 2001) ("[Respondent] argues that even if the federal courts have jurisdiction, [petitioner] does not have standing to bring this action. [Respondent] does not suggest that [petitioner] lacks Article III standing or that prudential considerations preclude [petitioner] from bringing suit. Rather, [Respondent] has framed this issue simply as one of statutory standing–whether Congress intended to confer standing on a litigant like [petitioner] to bring an action under [the statute in question]."); *General Instrument Corp. of Del. v. Nu-Tek Elecs. & Mfg., Inc.*, 197 F.3d 83, 86 (3d Cir. 1999) (explicitly distinguishing between the concepts of constitutional, prudential and statutory standing); *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225 (3d Cir. 1998) (distinguishing between prudential and statutory standing). Indeed, just because Congress has eliminated the judiciary's ability to impose non-constitutionally mandated prerequisites to standing under the ADA does not mean that Congress itself has conferred standing on all parties that fall within those constitutional limits.[29] Put differently, it is one thing for courts to impose judicially created standing

[29] Indeed, an examination of the regulations implementing Title III corroborates the conclusion that the Congress did not intend for the reach of that Title to be without limits. *See* 29 C.F.R. pt. 35, App. D to 29, § 35.130(g) (1999) (emphasis added) ("During the legislative process, the term 'entity' was added to section 302(b)(1)(e) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities."). The necessary implication of the fact that such an express provision was needed to bring such entities within the ambit of Title III is that the absence of any similar

requirements in the context of a remedial statute. It is quite another thing for them to enforce congressionally-delineated limits on the reach of such a statute. *See Access Living of Metro. Chicago v. Chicago Transit Auth.*, 2001 WL 492473, at *5 (N.D. Ill. May 9, 2001). Accordingly, several courts have enforced statutory standing limitations with respect to ADA claims. *See, e.g.*, *E.E.O.C. v. CNA Ins. Cos.*, 96 F.3d 1039, 1045 (7th Cir. 1996); *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996); *Bril v. Dean Witter, Discover & Co.*, 986 F. Supp. 171, 176 (S.D.N.Y. 1997); *Esfahani v. Med. College of Penn.*, 919 F. Supp. 832, 836 (E.D. Pa. 1996).

As applied to this case, these principles dictate that Nichols could proceed if, for example, it was asserting a claim on behalf of a party whose rights under the ADA had been violated.[30] However, they prevent Nichols from asserting a claim on its own behalf under Title III. As a corporation, of course, Nichols is not a disabled individual. Moreover, it does not allege that it has suffered discrimination as a result of its known association with one or more disabled persons.[31] Importantly, this distinguishes Nichols from the plaintiffs in many of the cases on which plaintiffs rely. *See Innovative Health Systems*, 117 F.3d at 40 (plaintiff drug and alcohol rehabilitation center denied building permit based on the nature of the services it provided); *Discovery House, Inc. v. Consolidated City of Indianapolis*, 43 F. Supp.2d 997, 999 (N.D. Ind. 1999) (drug rehabilitation treatment center deemed not to be permissible under

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statutory provision that pertains to Nichols precludes Nichols from bringing suit under § 12182.

[30] As indicated, *supra*, this is a label that does not attach to Thompson or Van Dalen, because, pursuant to *Lyons*, neither of these individuals suffer an injury in fact stemming from the non-compliance of the 1020 Andrews Drive building.

[31] This would be the case if, for example, Nichols was denied a lease by defendants because it employed disabled people.

applicable zoning laws, a determination that allegedly was due to the zoning board's animus against drug addicted persons and those who associate with such persons); *AIDS Healthcare Found.*, 1998 WL 1157405, at *1 (plaintiff non-profit provider of medical services to HIV and AIDS patients allegedly suffered retaliation and discriminated against based on advocacy on behalf of its patients); *Oak Ridge Care Center, Inc. v. Racine County*, 896 F. Supp. 867, 870 (E.D. Wisc. 1995) (residential drug and alcohol rehabilitation center denied conditional use permit due to the nature of its clientele).

Nichols's lack of standing under Title III of the statute is further confirmed through an examination of its first claim in a more conceptual light. In essence, Nichols is attempting to convert what is fundamentally a contract dispute into a substantive ADA claim. The right possessed by Nichols that allegedly has been violated by defendants is not to be free from discrimination on the basis of either its disability or its association with disabled persons, but rather is to an ADA-compliant workplace. The source of this right is not the substantive provisions of the ADA, but rather is a provision that plaintiffs aver to be inherent in their lease, a guaranty that they term a "self-evident[] entitle[ment] to a building that complied with controlling federal and state law." Pls.' Memo. in Support at 26. The resolution of such commercial disputes is not an end to which the ADA was designed as a means.[32]

In sum, Thompson and Van Dalen lack constitutional standing to advance their

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[32] Indeed, insofar as it pertains to Nichols, the foregoing standing analysis could alternatively be conceived of in terms of Nichols's lack of a cause of action under Title III of the ADA. Stated alternatively, that statutory provision does not provide for any party to advance a claim sounding in the deprivation of a contractual right to an ADA-compliant workplace. However, regardless of whether the conclusion that Nichols's present ADA claims are non-justiciable stems from its lack of standing or its lack of a cause of action under Title III, this result remains constant.

Title III claims because they are unable to demonstrate that they are sufficiently likely to be imminently subjected to the conditions in the 1020 Andrews Drive facility. Nichols lacks statutory standing to proceed under that provision. Accordingly, I will grant defendants' motion for summary judgment as to the ADA claims of all plaintiffs. Moreover, these claims were, taken together, the only hook on which federal subject matter jurisdiction hung in this action.[33] Although it is not the case that the dismissal of the first count of plaintiffs' complaint leaves the court without any possible basis for entertaining the remainder of plaintiffs' claims,[34] I decline to exercise my discretion to retain them. *See* 28 U.S.C. § 1367(c)(3); *Cook Drilling Corp. v. Halco Am., Inc.*, 2002 WL 84532, at *10 (E.D. Pa. Jan. 22, 2002). Accordingly, these claims will be dismissed without prejudice to plaintiffs' right to raise them in a tribunal that enjoys jurisdiction over them. A necessary corollary of this decision is that plaintiffs' motion for partial summary judgment will be denied and defendants' counterclaim will be dismissed without prejudice.

An appropriate order follows.

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[33] The prerequisites for jurisdiction pursuant to 28 U.S.C. § 1332 are lacking in this case because defendants and Nichols are both residents of Pennsylvania. *See* 28 U.S.C. § 1332(c)(1) (indicating that a corporation is considered a resident of both the state of its incorporation and the state in which its principal place of business is located). Accordingly, complete diversity is lacking, and diversity jurisdiction is non-existent. *See Mennen Co. v. Atlantic Mut. Ins. Co.*, 147 F.3d 287, 290 (3d Cir. 1998).

Moreover, the fact that plaintiffs also seek declaratory relief pursuant to 28 U.S.C. § 2201 similarly does not constitute an independent basis for federal jurisdiction. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *Terra Nova Ins. Co. Ltd. v. 900 Bar, Inc.*, 887 F.2d 1213, 1218 n.2 (3d Cir. 1989).

[34] I am afforded discretion by 28 U.S.C. § 1367(c)(3) to retain jurisdiction over state law claims, initially brought pursuant to the court's supplemental jurisdiction, when the federal claim on which original jurisdiction was based has been dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

W.G. NICHOLS, INC, RICHARD VAN DALEN, and CAROL THOMPSON, Plaintiffs,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 01-834
JOSEPH D. FERGUSON and MICHELE A. FERGUSON, Defendants.	:	

Order

And now, this ____ day of June, 2002, upon consideration of defendants' motion for summary judgment and the memorandum of law in support thereof (Doc. # 30), plaintiffs' motion for partial summary judgment and the memorandum of law in support thereof (Doc. # 31), defendants' response to plaintiffs' motion for partial summary judgment and the memorandum of law in support thereof (Doc. # 34), plaintiffs' sur-reply to defendants' opposition brief to plaintiffs' motion for partial summary judgment (Doc. # 37), plaintiffs' answer to defendants' motion for summary judgment and the memorandum of law in support thereof (Doc. # 38), plaintiffs' supplemental brief in support of their motion for summary judgment (Doc. # 47), plaintiffs' memorandum regarding the standing issue (Doc. # 48) and defendants' reply memorandum of law regarding standing (Doc. # 49), it is hereby ORDERED that defendants' motion for summary judgment is GRANTED. JUDGMENT IS ENTERED in favor of defendants and against plaintiffs on count I of the amended complaint insofar as it asserts violations of Title III of the Americans With Disabilities Act. The remaining counts of the amended complaint and defendants' counterclaim are DISMISSED WITHOUT PREJUDICE

to plaintiffs' right to advance them in a forum enjoying jurisdiction over them. Plaintiffs' Motion for Partial Summary Judgment is DISMISSED AS MOOT.

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William H. Yohn, Jr., Judge